# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 21, 2014 |
| v | No. 311739<br>Berrien Circuit Court |
| MICHAEL EUGENE BARNER,<br><br>Defendant-Appellant. | LC No. 2011-003033-FC |

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Michael Eugene Barner of two counts of armed robbery, MCL 750.529, and one count each of possession of a firearm by a felon, MCL 750.442f, possession of a firearm during the commission of a felony, MCL 750.227b, and interference with a telephone communication, MCL 750.5405a. Defendant's convictions arise from a carefully orchestrated jewelry store heist staged by a group of men.

On appeal, defendant challenges the sufficiency of the evidence supporting his convictions. Defendant also raises various challenges related to the main eyewitness's failure to notice and describe defendant's eye deformity and the prosecution's use of turncoat evidence against him. Defendant previously filed a motion in this Court to remand for a *Ginther*[1] hearing to develop a record regarding defense counsel's performance before and at trial. This Court denied defendant's motion.

After careful consideration, we deny defendant's motion for reconsideration and renewed request to remand this case for an evidentiary hearing. By granting defendant's motions to file his in propria persona motion and expand the record on appeal, there is sufficient information for this Court to fully review defendant's claims of error. Based on the record and additional evidence presented by defendant, we discern no error warranting relief. We therefore affirm defendant's convictions and sentences.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

## I. BACKGROUND

In the late morning of July 19, 2011, a group of men robbed Napier Gold and Silver in Benton Township. One armed man restrained store owner Robert Wagner in the front of the shop and barked orders to his accomplices. A second armed man restrained co-owner Linda Wagner in the store's office. A third man collected jewelry and cash in a bag. Before the robbers left, the man directing the scene ordered another to rip the landline telephone from the wall. The trio took approximately $40,000 in jewelry and coins, as well as $12,000 to $14,000 in cash. They fled the scene in a tan or silver Lincoln Navigator SUV. Robert was able to free himself from his restraints, grabbed his own gun and fired three shots at the SUV as it drove away. Robert missed his target, however.

Robert and a witness who noticed the Navigator fleeing the scene both gave chase in their own vehicles. They tracked the Navigator onto westbound I-94 but were unable to match the SUV's high rate of speed. Shortly thereafter, a police officer came across a silver Navigator on the expressway, effectuated a traffic stop and called for backup. Defendant, Quentin Willford, and Stanley White[2] were inside. When defendant exited the Navigator, a black and white bandana fell from his lap. Other officers brought Robert and Linda to the arrest scene. Robert identified defendant and Linda identified Willford. In his statement to the investigating officers, defendant claimed that he and some friends drove to Grand Rapids the night before in a borrowed car. He claimed to have been sleeping off a hangover all morning in the Navigator's backseat. The car's owner, however, testified that defendant and his compatriots borrowed the vehicle on the morning of the robbery.

About seven months later, Willford agreed to speak to the police in exchange for a plea agreement for one charge of armed robbery and a minimum sentence between 11 and 18 years' imprisonment. Willford tried to minimize his role in the robbery, but placed defendant as the man in the front of the shop that directed the others and restrained Robert. Willford testified that the robbery was actually a complex plan involving multiple actors. Taiwan Preer (White's brother-in-law) and "Awal" (later identified as Wilbert Avant) went into the jewelry store just before the robbery to investigate the surroundings and determine the number of people inside.[3] They then left the scene in a rental car. Despite Linda's statement that Willford was inside the

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[2] For his role in these offenses, Willford pleaded guilty to one count of armed robbery and was sentenced to 135 to 405 months' imprisonment. Willford filed a delayed application for leave to appeal to challenge the restitution he was ordered to pay the Wagners. This Court denied that application. *People v Willford*, unpublished order of the Court of Appeals, entered September 21, 2012 (Docket No. 311809). White was convicted of two counts of armed robbery and one count of felony-firearm, and was sentenced to 12 to 30 years' imprisonment with a consecutive two-year term. White appealed his convictions and this Court affirmed. *People v White*, unpublished opinion per curiam of the Court of Appeals, issued August 8, 2013 (Docket No. 310918).

[3] This fact was consistent with Robert's testimony that two men came into the store that morning to ask about a ring.

store, Willford claimed that he remained in the Navigator while defendant, White and "Old School" went inside to perpetrate the robbery. Willford continued that he drove the Navigator to a McDonald's restaurant along I-94 after the robbery to meet Preer and Avant.[4] The men stashed the weapons and spoils of the robbery in the rental car's trunk and Preer, Avant, and Old School left in that vehicle. The stolen goods were never recovered. It appears that Preer and Avant were not charged in relation to this incident and that Old School's identity was never discovered. Willford claimed that he, defendant, and White then headed back toward their homes in Indianapolis in the Navigator but were stopped almost immediately after reentering the expressway.

## II. VICTIM DESCRIPTIONS OF ASSAILANT

A key issue in this trial was Robert's identification of defendant as his assailant. At trial, Robert described the man who restrained him as African-American, 5'8" to 5'10" tall, weighing 180 to 200 pounds, and wearing blue latex gloves and a white t-shirt. Robert indicated that the robber wore a white and black bandana over the lower portion of his face. Robert testified that the man held a nine millimeter handgun about six inches from Robert's face. For the first time at trial, Robert added that his assailant wore dark sunglasses. Linda described the man who restrained her in the office as African-American, with long curly hair and wearing blue gloves.

At the preliminary examination, Robert claimed that the only description he gave police before the show-up identification was of the robber's build. Robert admitted that the lighting was good at the time of the robbery and that he was not wearing his glasses because he sees fine without them. Robert repeatedly indicated that he had a more than adequate opportunity to see his assailant: "I seen the guy right in my face and that's what I was focusing at;" "I froze, and I just kept looking at him, 'cause he had the gun between my eyes;" "I just kept looking at him, over and over again." Robert testified that the robber was wearing a black and white bandana over his mouth and nose, but that he could "see[] his upper part of his face."

On cross-examination at the preliminary examination, Robert repeated, "I remember his build and his upper part of his face." Defense counsel questioned Robert about his description and identification of defendant:

> *Q.* At the time that this incident occurred, were there any other identifying features that you were able to tell the officer that you noticed?
>
> *A.* No.
>
> * * *
>
> *Q.* And as you saw this person you've identified as [defendant], what were the identifying features that enabled you to identify him?

[4] Surveillance footage from the McDonald's parking lot showed the Navigator drive onto the premises.

*A.* His build. His height. The upper part of his face.

*Q.* What about the upper part of his face?

*A.* When you're looking at him and a gun in your face, you don't remember—you don't forget what somebody looks like. And his height and his build.

* * *

*Q.* Was there something about his hair?

*A.* Not really.

*Q.* Was there something about his clothing?

*A.* Well, he had a T-shirt on, but I remember his built [sic] and his height and his eyes, his face up there.

*Q.* Well, you said his eyes. What about his eyes.

*A.* I looked at him, like I'm looking at him here. I looked at him and he's screaming and hollering at me. You'll never forget it.

*Q.* And was there something about his eyes?

*A.* I just looked at him. That's all. I couldn't—I couldn't move.

* * *

*Q.* Anything else about his forehead? Were there any marks, identifying features?

*A.* I didn't even notice I was so scared.

The import of Robert's addition at trial that defendant was wearing sunglasses is that defendant has an obvious eye deformity that Robert never described to the police or during the preliminary examination. According to medical records, defendant suffered an injury to his left eye approximately one year before the robbery. At that time, defendant's left eye was completely swollen shut. Over the next several months, defendant received treatment for left eye infections. Two days after his arrest for the current offenses, defendant was seen by medical staff in the jail. The doctor noted that defendant was "unable to open" his left eye due to "muscle fx." Robert never mentioned that his assailant was unable to open his left eye.

## III. SUFFICIENCY OF THE EVIDENCE

Defendant challenges the sufficiency of the evidence offered to prove his identity as the person who committed the charged crimes. We review de novo a challenge to the sufficiency of the evidence. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). In doing so,

we "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "The prosecutor is not required to present direct evidence linking the defendant to the crime." *People v Saunders*, 189 Mich App 494, 495; 473 NW2d 755 (1991). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (quotation marks and citation omitted). We must also "draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.* "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). "[P]ositive identification by witnesses may be sufficient to support a conviction of a crime." *Id.*

The prosecutor presented sufficient evidence to establish defendant's identity as one of the participants in the Napier Gold and Silver robbery. Upon his arrest, defendant was an occupant of a Navigator matching the description of the one seen driving away from the robbery scene. When defendant alighted from the vehicle, a black and white bandana matching that used in the robbery fell from his lap. A torn piece of blue latex, akin to the gloves worn by the robbers, was also found inside the vehicle. Defendant complains of the lack of DNA evidence tying him to the bandana and the latex glove shard. Defendant also complains about the lack of video evidence placing him in the store. The jury was presented with information that the store's antiquated video surveillance system malfunctioned and that only DNA from unknown males was found on the evidence recovered. The jury was also told that the Navigator's tires could not be matched to tread marks found in the store's parking lot because of the technically inadequate manner in which that evidence was obtained. The jury apparently found the eyewitness and accomplice testimony placing defendant at the scene more compelling than the lack of forensic evidence.

Defendant further contends that Willford fabricated his tale against him. The credibility of witnesses is a matter solely for the jury. *Wolfe*, 440 Mich 514-515. Willford positively identified defendant, his long-time friend, as the robber wearing the black and white bandana. Willford explained the absence of evidence inside the Navigator, specifically the robbery spoils and weapons, by testifying that the men moved those items into the rental car occupied by Preer, Avant, and Old School. The jury was aware of the benefit Willford received in exchange for his testimony. The jury was also placed on guard that Willford's testimony was less than honest: Willford testified that he remained in the vehicle as the get-away driver because he suffered a disability. Linda, however, positively placed Willford in the store due to his unique hairstyle and because her assailant moved in an odd manner, as though from a physical disability. The jury weighed this evidence and found credible Willford's claims regarding defendant.

Defendant's most compelling challenge is to Robert's identification testimony. Robert repeatedly asserted before trial that he saw the upper part of the robber's face and would never forget it. His pretrial descriptions of the robber consistently omitted mention of any eye deformity. Rather than admit his mistake, Robert suddenly remembered at trial that defendant was wearing dark sunglasses that masked his drooping left eye. This testimony was inconsistent with White's statement upon the three men's arrest that sunglasses found in the car belonged to

him. It also contradicted Linda's description of her assailant during the robbery as the one wearing the sunglasses.

The jury had information suggesting that Robert's ability to remember details of the robber's face was compromised. An officer responding to the robbery scene testified that Robert "was definitely shaken. Appeared to be scared. Almost confused at a point when trying to give me different information about what was going on and how things happened." And hearing Robert's description of events with the robber yelling in his face and holding a gun between his eyes, the jury may have believed that Robert was simply confused. The jury may also have believed that defendant's eye deformity was not always as noticeable as it was at trial, as the officer who pulled defendant from the Navigator noticed nothing unusual.

While Robert's sudden change in the description of his attacker is troublesome, we discern no error requiring reversal. Given Willford's placement of defendant at the scene and the discovery of a black and white bandana on defendant's lap, the jury could have convicted defendant even absent Robert's identification testimony.

## IV. SHOW-UP IDENTIFICATION

In his in propria persona brief filed pursuant to Administrative Order 2004-6, Standard 4, defendant advances several additional claims of error. Initially, defendant argues that his identification by Robert at the show-up on I-94 was overly suggestive and tainted Robert's in-court identification. The admission of this identification evidence, defendant contends, violated his right to due process of law. Defendant failed to preserve this issue by filing a motion to suppress. *People v Daniels*, 163 Mich App 703, 710; 415 NW2d 282 (1987). Our review is therefore limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

This Court has recognized "the inherent suggestiveness of on-the-scene identifications," especially without the presence of counsel. See *People v Wilki*, 132 Mich App 140, 143; 347 NW2d 735 (1984). We have also acknowledged that such identification procedures are "indispensable[] police practices," allowing law enforcement to quickly determine if a suspect found close in time and proximity to an offense is the offender. See *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997).

> In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial. However, in-court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure. [*People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993).]

"The relevant inquiry . . . is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification." *Id.* at 306. In conducting that analysis, a court may consider various factors, including:

> [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness'[s] degree of attention, [3] the accuracy of the witness'[s] prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation. [*Id.* (quotation marks and citation omitted).]

Our Supreme Court has also delineated the following factors to consider in determining whether an independent basis for the victim's identification exists:

> "1. Prior relationship with or knowledge of the defendant.
>
> 2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act.
>
> 3. Length of time between the offense and the disputed identification. . . .
>
> 4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.
>
> 5. Any previous proper identification or failure to identify the defendant.
>
> 6. Any identification prior to lineup or showup of another person as defendant.
>
> 7. . . .The nature of the alleged offense and the physical and psychological state of the victim. 'In critical situations perception will become distorted and any strong emotion (as opposed to mildly emotional experiences) will affect not only what and how much we perceive, but also will affect our memory of what occurred.' [*People v Anderson*, 389 Mich 155, 211; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).]
>
> Factors such as 'fatigue, nervous exhaustion, alcohol and drugs,' [*Id.* at 213], and age and intelligence of the witness are obviously relevant. Levine and Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U Pa L R 1079, 1102-1103 (1973).
>
> 8. Any idiosyncratic or special features of defendant." [*People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998), quoting *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977) (emphases omitted).]

Here, Robert testified that he had adequate opportunity to view the criminal during the offense. The robber stood in close proximity with his face near to Robert, and the witness focused on his assailant. The lighting was good and nothing impeded Robert's ability to see. See *Gray*, 457 Mich at 116, factor 2; *Kurylczyk*, 443 Mich at 306, factor 1. Approximately 30

minutes elapsed between the robbery and Robert's roadside identification of defendant. See *Gray*, factor 3; *Kurylczyk*, factor 5. Robert was certain about his identification at that time and at trial. See *Kurylczyk*, factor 4. Robert's description of the robber's size, build, race, clothing, and use of a black and white bandana matched defendant's features. See *Gray*, factor 4; *Kurylczyk*, factor 3.

However, Robert failed to describe his assailant as having an eye deformity. Viewing photographs of defendant, his malady was an obvious "idiosyncratic or special feature[]" that one would expect a person in Robert's position to notice. See *Gray*, factor 8. Yet, the officer who arrested defendant did not "notice anything unusual about his face . . . at that time." And Robert had been placed "[i]n [a] critical situation[]" during which his "perception" and "memory" could have been "distorted" and affect[ed]," *Gray*, factor 7, explaining his inability to notice or remember defendant's eye deformity.

Viewing the totality of the circumstances, although the identification procedure was less than ideal, it was not so unduly suggestive that it denied defendant due process of law. Moreover, we do not conclude that the identification procedure led to the conviction of an actually innocent defendant. Defendant's accomplice placed him at the scene and defendant's vehicle contained evidence linking him to the crime (the bandana and the glove fragments). Accordingly, even if the identification procedure was improper, we discern no plain error warranting reversal.

Defendant also implies that the identification procedure was improper because counsel was not present. However, a defendant's right to counsel "attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings." *Hickman*, 470 Mich at 610; see also *Kirby v Illinois*, 406 US 682, 688; 92 S Ct 877; 32 L Ed 2d 411 (1972). Because adversarial judicial criminal proceedings had yet to be initiated at the time of the identification, defendant's argument fails.

## V. TESTIMONY OF TURNCOAT WITNESS

Next, defendant argues that he was convicted based on the improperly admitted, false testimony of Willford. According to defendant, Willford was motivated to provide false testimony implicating defendant and to downplay his own role, by the beneficial terms of his plea agreement. Defendant did not seek to exclude this evidence, however, and our review again is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

> The credibility of an accomplice is a jury question. A jury may convict on the basis of accomplice testimony alone. However, our courts have recognized that an accomplice may have a special interest in testifying, thus raising doubts concerning his veracity. It is therefore well established that when an accomplice testifies for the prosecution, the testimony is suspect and must be received only with great care and caution. [*People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).]

The jury was aware of the terms of Willford's plea agreement and could weigh his potential bias. The jury also heard witness testimony conflicting with Willford's claimed

minimal role in the robbery. The trier of fact therefore was able to assess Willford's credibility. The trial court even cautioned the jury regarding the use of accomplice testimony consistent with M Crim JI 5.6. The jury found Willford to be a credible witness and we may not interfere with that judgment. *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). Accordingly, we discern no error.

## VI. PROSECUTORIAL MISCONDUCT

Defendant contends that he was deprived of a fair trial by several instances of prosecutorial misconduct. Defendant failed to raise timely objections in the trial court and our review is for plain error alone. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

> The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. [*People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999).]

### A. Failure to Disclose Exculpatory Evidence

Defendant first argues that the prosecutor engaged in misconduct by failing to turn over exculpatory evidence as required by *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Defendant only vaguely refers to "evidence that the defense might have used to impeach the government witness by showing 'bias' or 'interest.'" We assume defendant is referring to information regarding Willford's plea agreement. There is no record indication that the prosecutor failed to provide this information to defendant before trial. Accordingly, we can find no error, plain or otherwise.

### B. Presentation of False Testimony

Defendant contends that the prosecutor presented false testimony through Robert Wagner when he stated for the first time at trial that defendant wore dark sunglasses during the robbery. It is possible that Robert concocted this story to explain away his failure to notice defendant's eye deformity. Defendant correctly recognizes that a "prosecutor may not knowingly use false testimony to obtain a conviction" and that "a prosecutor has a duty to correct false testimony." *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). Defendant was not unduly prejudiced by the admission of Robert's testimony, even if false. On cross-examination, defense counsel elicited Robert's testimony that he told the police that he looked directly into the robber's face and yet failed to mention that defendant was wearing sunglasses. The officer who took Robert's statement at the scene confirmed the absence of that detail from his description of the robber. Any error would therefore not warrant relief.

Defendant also suggests that the prosecutor presented false evidence to the jury by using the black and white bandana to link him to the robbery despite the lack of defendant's DNA on that object. Robert and Willford both testified that defendant was wearing the bandana. And the bandana fell from defendant's lap when he exited the Navigator. A prosecution witness

specifically told the jury that defendant's DNA was not found on the bandana. It was within the jury's sole province to assess the credibility and weight of that evidence. *Unger*, 278 Mich App at 222.

C. Vouching for Witness Credibility and Denigrating Defendant

Defendant argues that the prosecutor improperly vouched for Willford's credibility and denigrated defendant by accusing him of "lying." In closing argument and during rebuttal, the prosecutor made several comments to which defendant now objects:

> Sometimes in dealing with cases like this when there are multiple people involved[,] it's a necessary evil to get cooperation from co-defendants. Quentin Willford in this case was willing to cooperate. Guess what? He's still going to prison. He's going to prison for a while, somewhere between 11 and 18 years on the minimum is what you heard him tell you. He doesn't even know what his maximum will be. So it's not as if he got some great deal and is going to walk out the door tomorrow after testifying.
>
> * * *
>
> Ladies and gentlemen, I'd ask you to remember one thing about what Quentin Willford said in terms of his cooperation. Part of his plea agreement is that he cooperate against all defendants, not just Michael Barner.
>
> So to put Michael Barner as the guy in the store when he's known Michael Barner pretty much the longest of any of those guys, why would he do that as opposed to putting Michael Barner maybe as the lookout or something, unless Michael Barner went into that store. It doesn't benefit Quentin Willford at all to put Michael Barner in the store as opposed to putting [Avant] in the store or [Preer] in the store, because he has to cooperate against all of them. So it doesn't – he has no reason to make up who did what as opposed – in terms of who was involved where, because it doesn't benefit him at all.

Defendant complains that these statements bolstered Willford's credibility and were extremely prejudicial when taken in conjunction with various challenged statements about defendant's lack of veracity:

> We have to look at the credibility of the defendant's statements to the police. We know from Quentin Willford that the parting [sic] line was supposed to be tell them you're—we were coming from Grand Rapids. Well, we know from Quentin Willford that that's not what he was telling you. That was just what they were supposed to say. . . . That's what the defendant tells the police that day.
>
> * * *
>
> And can you believe what the defendant told the police that he's sleeping, not only then do they finally get on the highway, but they're flying down the highway at 95 miles an hour, 100 miles an hour, . . . they ramp off. Have any of

> you ever fallen asleep in the car? What happens when you're driving down the highway and you ramp off? You wake up typically.
>
> * * *
>
> And what else do we know? We know from Shenetta Preer, whose vehicle this was, when she gave that vehicle to Stanley White. When did she say she gave that vehicle to Stanley White? That morning. So how, if she gave that vehicle to Stanley White that morning, is it possible, as the defendant wanted the police to believe, that they were in Grand Rapids the night before? It's not true. They weren't in Grand Rapids the night before.

Defendant quotes the prosecutor as proceeding to argue that defendant was "lying." That statement does not appear in the transcript.

"Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness'[s] truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). In *Bahoda*, the prosecution presented the testimony of accomplices and informed the jury that the witnesses were testifying against the defendant in exchange for a plea agreement or "use immunity. *Id.* at 274-275. As in this case, the prosecutor in *Bahoda* reminded the jury of that evidence in closing argument. *Id.* at 275 n 20. The prosecutor's commentary merely responded to the defense argument that Willford was untruthful about the events surrounding the robbery. Defendant claimed that Willford lied and the prosecutor countered with reasons to infer that Willford was being honest. This was permitted responsive argument. See *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007).

We also discern no error in the prosecutor's commentary regarding defendant's credibility. "A prosecutor may . . . argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor argued based on the evidence that defendant's version of events could not be true. There was evidence contradicting defendant's claim that he had arrived in Grand Rapids the night before and defendant's story that he slept through the car ride on the day in question was not logical in the prosecutor's estimation. This is the type of credibility argument properly addressed in a closing argument.

D. Reference to Defendant's Post-Arrest, Post-Rights Silence

Finally, defendant asserts that the prosecutor improperly elicited testimony regarding his post-arrest, post-*Miranda*[5] silence and returned to this topic during closing arguments.

Benton Harbor police detective Brian Smit interviewed defendant following his arrest. Before questioning defendant, Smit read defendant his *Miranda* rights. Defendant "signed the

[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

*Miranda* card," but also "made a statement to where he didn't want to say anything incriminating[.]" The detective explained to defendant that "he could stop answering questions at any time." After Detective Smit testified regarding the content of the interview, the prosecutor elicited the following testimony:

> *Q.* How did you end the interview?
>
> *A.* He had commented that he didn't want to say anything more or get anything mixed up, and I had told him that he was being charged with armed robbery and would be lodged at the Berrien County Jail.

Subsequently, during closing argument, the prosecutor asserted:

> You heard from the police about the statement that the defendant made. What does he tell him? I don't want to incriminate myself. Why would that be a problem if you didn't do anything wrong? I don't want to say too much. How could you say too much if you were sleeping in the back of that Lincoln Navigator and don't know anything about anything? How could you say too much?

The prosecutor reiterated this logic during rebuttal:

> As far as twisting the defendant's words, if you don't know anything about a robbery, you don't know where you were in Benton Harbor, how can those words be used against you? You either know something or you don't know something. The only way something's going to be used against you is if you know something. If he doesn't know anything, his words aren't going to be twisted around and he can say I don't know anything. But that's not what he said. He said some other things that day to the police.

"The United States Constitution guarantees that no person 'shall be compelled in any criminal case to be a witness against himself.'" *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009), quoting US Const, Am V. "As a general rule, if a person remains silent after being arrested and given *Miranda* warnings, that silence may not be used as evidence against that person." *Id.* "Prosecutorial references to a defendant's post-arrest, post-*Miranda* silence violate a defendant's due process rights," as well as the defendant's right to remain silent. *Id.* at 212-213. To invoke the right to remain silent and preclude the use of that silence at trial, the defendant must make an unambiguous and unequivocal statement that he wants to remain silent or that he does not want to talk with police. *Berghuis v Thompkins*, 560 US 370, 381-382; 130 S Ct 2250; 176 L Ed 2d 1098 (2010).

Defendant's statement that "he didn't want to say anything incriminating" was not a clear and certain invocation of his right to remain silent. Defendant did not express a desire to remain silent, only to refrain from saying certain things, i.e., those things that would incriminate him. Detective Smit would have been "required to make difficult decisions about [defendant's] unclear intent." *Id.* at 382. Therefore, Detective Smit could inform the jury about defendant's statement without invading defendant's constitutional rights.

Detective Smit also testified that he stopped questioning defendant when he more clearly stated "that he didn't want to say anything more or get anything mixed up." Defendant's statement that "he didn't want to say anything more" reflects an unequivocal invocation of his right to remain silent. Therefore, the prosecutor should not have elicited Smit's testimony in this regard. The reference to defendant's silence was a fleeting moment in Detective Smit's testimony and was only briefly mentioned in closing argument. As such, defendant has demonstrated no prejudice requiring reversal.

## VII. ASSISTANCE OF COUNSEL

Defendant finally raises multiple challenges to trial counsel's performance. Although we deny defendant's motion to remand for an evidentiary hearing, we grant defendant's motion to expand the record on appeal. While our review is limited to errors in the newly expanded record, see *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003), we have more than adequate information to assess defendant's challenges.

"'[T]he right to counsel is the right to the effective assistance of counsel.'" *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). A defendant's claim of ineffective assistance includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v Washington*, 466 U.S. 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish the deficiency component, a defendant must show that counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant also must overcome the strong presumptions that his "counsel's conduct [fell] within the wide range of reasonable professional assistance," and that counsel's actions were sound trial strategy. *Strickland*, 466 US at 689.

Defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation marks and citation omitted).

### A. Impeachment of Robert Wagner

The majority of defendant's complaints surround defense counsel's failure to capitalize on Robert Wagner's failure to notice defendant's obvious eye deformity and belated memory at trial that the robber wore dark sunglasses, masking any such condition. Defendant asserts that counsel should have used Robert's preliminary examination testimony to impeach his trial testimony. Counsel did impeach Robert with the description he provided to the police, which included no mention of the robber wearing sunglasses. We agree with defendant that Robert's impeachment would have been more complete had counsel also used Robert's preliminary examination testimony that he was able to identify defendant by looking at "[t]he upper part of

his face" and that he "remember[ed] . . . [the robber's] eyes." Certainly, this additional impeachment would have had some impact on the jury's assessment of Robert's credibility.

We discern no reasonable probability, however, that this additional impeachment would have altered the outcome of defendant's trial. Counsel had already impeached Robert's testimony with his statement to the police. The officer who took Robert's description of the robber testified that Robert was visibly shaken and confused by the traumatic situation. This high level of emotion could innocently explain Robert's failure to notice defendant's eye deformity. See *Anderson*, 389 Mich at 211. And Willford's placement of defendant at the scene of the robbery was the most damaging evidence against him.

B. Securing Additional Description Evidence

Defendant also challenges defense counsel's failure to secure medical records, booking pictures, and other evidence to show that he had a noticeable eye deformity at the time of the offense. Such tangible evidence would have added further support to counsel's impeachment of Robert's identification of defendant. We agree that counsel should have investigated this issue further. Even without Robert's sudden addition of sunglasses to the robber's description, his failure to previously mention defendant's eye deformity should have been a larger point in the defense. Yet again, we discern no prejudice given the extent of the testimony provided by Willford.

C. Jury Instruction on Eyewitness Identification

Defendant contends that counsel should have requested jury instructions regarding the unreliable nature of eyewitness identifications and the inconsistency between Robert's description of the robber and defendant's actual appearance. Counsel could have requested the court to provide M Crim JI 7.8, regarding the dependability and reliability of identification testimony. Through this instruction, the court would have specifically cautioned the jury of various factors affecting the accuracy of eyewitness identifications and directed the jury to consider inconsistencies in the eyewitness's descriptions. The court did provide the jury with generalized instructions about assessing witness credibility, including that factors that could have affected the witness's memory or perception. Given Willford's corroborating testimony, we cannot conclude that defendant was prejudiced by the court's failure to more specifically address Robert's credibility in the jury instructions.

D. Identification Suppression

Defendant complains that defense counsel should have sought to suppress Robert's pretrial and in-court identifications because defendant's actual appearance did not match Robert's description. Inconsistencies between a witness's pretrial statements and in-court testimony go to weight, not admissibility. *People v Barrera*, 451 Mich 261, 289; 547 NW2d 280 (1996). Defense counsel was not ineffective in failing to raise a meritless motion to suppress. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

E. Impeachment of Willford

Defendant challenges counsel's failure to discover and utilize the details of Willford's plea agreement and past criminal record to more strenuously impeach the accomplice witness's credibility. As already noted, there is no record indication that defense counsel did not know the details of Willford's plea agreement before trial. That information was actually presented to the jury and Willford's motives were placed at issue.

According to the Michigan Offender Tracking Information System, Willford had been on parole for a prior offense when he participated in the current armed robbery. See <http://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=774784> (accessed December 26, 2013). In his home state of Indiana, Willford had prior convictions for selling cocaine, escape, and burglary. Indiana Department of Corrections, <http://www.in.gov/apps/indcorrection/ofs/ofs;jsessionid=3U7iDT_TlQfomQzVmu?lname=Willford&fname=Quentin&search1.x=0&search1.y=0> (accessed December 26, 2013). Willford's burglary conviction occurred less than 10 years before defendant's trial, MRE 609(c), and could have been used to impeach Willford's credibility if the court found the evidence more probative than prejudicial. MRE 609(a)(2).

The additional impeachment of Willford with his prior burglary conviction likely would not have changed the outcome of defendant's trial. Willford admitted playing a part in the current robbery, a crime that portrayed him a negative light. The jury was already on guard regarding Willford's lack of credibility given his attempts to minimize his role in the robbery in contradiction of Linda Wagner's testimony. And yet, the jury credited Willford's placement of defendant at the scene. We discern no ground for reversal under the circumstances.

F. Objections to Prosecutorial Misconduct

Defendant also challenges defense counsel's failure to object to the prosecutor's use of defendant's silence against him, commentary on witness credibility, and use of false testimony at trial. As noted, the prosecutor should not have elicited testimony about defendant's statement invoking his right to remain silent or referenced that statement in closing argument. And there is a possibility that Robert's sudden memory that his assailant wore dark sunglasses was false. Sometimes, the decision not to raise an objection is strategic. Had counsel objected to Detective Smit's short reference to defendant's decision to invoke his right to remain silent at the end of his police interview and the prosecutor's brief reference to that improper piece of evidence, defense counsel could have drawn unwanted attention to defendant's remark. See *Bahoda*, 448 Mich at 287 n 54 ("Certainly there are times when it is better not to object and draw attention to an improper comment."). Moreover, counsel did not ignore Robert's addition of sunglasses to the robber's description. Instead of objecting, defense counsel cross examined Robert on the subject.

The prosecutor did not, however, improperly vouch for the credibility of the prosecution witnesses or denigrate the defense. As such, there was nothing to which defense counsel could object. Counsel was not ineffective in failing to raise frivolous objections. *Fike*, 228 Mich App at 182.

We affirm.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher